

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Lexington County  
DeAndrea G. Benjamin, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

NOV 12 2015

S.C. Supreme Court

ROBERT FLETCHER HERBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001507

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX ..... 1

ISSUE PRESENTED ..... 2

STATEMENT ..... 3

ARGUMENT ..... 4

CONCLUSION ..... 6

ISSUE PRESENTED

Whether counsel was ineffective in failing to convey a plea offer?

## STATEMENT

On June 6, 2013, petitioner appeared before the Hon. Edward B. Cottingham in Lexington County and pled guilty to two counts of second degree burglary, intimidation of a witness, manufacture of a destructive device, arson in the third degree, and burglary in the third degree. An active sentence totaling twenty years was imposed. Sarah Hahn Maudlin, Esq. was plea counsel.<sup>1</sup> Angela Garrick, Esq. was the assistant solicitor. (App. p. 1-29)

Petitioner filed an application for post-conviction relief on November 12, 2013. (App. p. 30-p.38) An amended application dated June 2, 2014 was also filed. (App. p. 39-p. 42) Respondent filed a return dated April 28, 2014. (App. p. 43-p. 46) An evidentiary hearing was held on October 15, 2014, before the Hon. Deandrea G. Benjamin. Petitioner was present and was represented by Anna R. Good, Esq. Respondent was represented by Clay Mitchell, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 48-p. 86) On June 11, 2015, Judge Benjamin issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 91-p. 99).

This petition follows.

---

<sup>1</sup> Matthew C. Buchanan had previously represented petitioner.

## ARGUMENT

### Counsel was ineffective in failing to convey a plea offer.

Petitioner through his post-conviction relief counsel alleged in his amended application that counsel Buchanan failed to relay a plea offer to him. (App. p. 4) At the evidentiary hearing he testified that Matthew Buchanan was his first attorney when he was arrested in April of 2012. He bonded out on that charge and was then re-arrested in July of 2012. Mr. Buchanan was still his attorney and he met with him on August 7 at the jail. (App. p. 52, line 12-p. 53, line 9) Eventually he moved to relieve Mr. Buchanan as his attorney because he wouldn't come up to the jail and talk about his case. On October 31 he wrote the clerk of court a letter stating if Mr. Buchanan did not come to see him, he was going to move to relieve him and he was going to file charges with the South Carolina Supreme Court. Counsel was later relieved. During the time Mr. Buchanan was his attorney, petitioner found out that a plea offer had been made. He did not find that out from his attorney. He said he found out about the plea offer when he wrote for his Rule 5 when he was sent to Perry Correctional Institution. He then identified Plaintiff's Exhibit #1 as the plea offer he had not received. (App. p. 53, line 20-p. 55, line 25) The plea offer was dated August 24, 2012, and had a cap of 15 years. It stated that the offer would expire if not accepted by October 1. (App. p. 87)

Petitioner testified that if he had known about the plea offer he would have accepted it. (App. p. 56, line 22-p.57, line 1) Petitioner said he was asking the court to overturn his guilty plea and remand his case specifically to give him the remedy of the prior plea offer. (App. p. 64, lines 4-8)

In Davie v. State, 381 S.C. 601, 675 S.E. 2d 419 (2009) the Supreme Court of South Carolina wrote:

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court has held that a defendant has the right to effective assistance of counsel during the plea bargaining process. Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000).

\* \* \*

In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "In the context of a guilty plea, the court must determine whether 1) counsel's advice was within the range of competence demanded of attorneys in criminal cases i.e. was counsel's performance deficient, and 2) if there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty." Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

The court in Davie went on to hold plea counsel ineffective in failing to convey a plea offer to his client. Plea counsel in petitioner's case should also be held ineffective.

CONCLUSION

Petitioner's writ should be granted.

Respectfully submitted,

*Robert M. Pachak*

---

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of November, 2015.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Lexington County

DeAndrea G. Benjamin, Circuit Court Judge

---

ROBERT FLETCHER HERBERT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-001507

---

CERTIFICATE OF SERVICE

---


I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Patrick Schmeckpeper, Esquire this 12th day of November, 2015.



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day  
of November, 2015.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina

My Commission Expires: May 12, 2025.